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 DIGITAL IMAGE TECHNOLOGIES, LLC

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 WESTERN DIVISION

DIGITECH IMAGE
 TECHNOLOGIES, LLC,
 Plaintiff,
 v.
 ELECTRONICS FOR IMAGING,
 INC.,
 Defendant.

CASE NO. SACV 12-01324-ODW
 (MRW_x)

JOINT SUBMISSION REGARDING
 PROTECTIVE ORDER AND ESI
 ORDER

Judge: Hon. Otis D. Wright, II

DIGITECH IMAGE
 TECHNOLOGIES, LLC,
 Plaintiff,
 v.
 PANASONIC CORPORATION
 and PANASONIC
 CORPORATION OF NORTH
 AMERICA,
 Defendants.

CASE NO. SACV 12-01667-ODW
 (MRW_x)

JOINT SUBMISSION REGARDING
 PROTECTIVE ORDER AND ESI
 ORDER

Judge: Hon. Otis D. Wright, II

1 2 3 4 5 6 7	DIGITECH IMAGE TECHNOLOGIES, LLC, Plaintiff, v. CANON INC. and CANON U.S.A., INC., Defendants.	CASE NO. SACV 12-01670-ODW (MRW _x) JOINT SUBMISSION REGARDING PROTECTIVE ORDER AND ESI ORDER Judge: Hon. Otis D. Wright, II
8 9 10 11 12	DIGITECH IMAGE TECHNOLOGIES, LLC, Plaintiff, v. SAKAR INTERNATIONAL, INC. d/b/a VIVITAR, Defendant.	CASE NO. 8:12-CV-01673-ODW (MRW _x) JOINT SUBMISSION REGARDING PROTECTIVE ORDER AND ESI ORDER Judge: Hon. Otis D. Wright, II
13 14 15 16 17 18	DIGITECH IMAGE TECHNOLOGIES, LLC, Plaintiff, v. LEAF IMAGING LTD (d/b/a Mamiyaleaf), and MAMIYA AMERICA CORPORATION, Defendants.	CASE NO. 8:12-CV-01675-ODW (MRW) JOINT SUBMISSION REGARDING PROTECTIVE ORDER AND ESI ORDER Judge: Hon. Otis D. Wright, II

1 2 3 4 5 6	DIGITECH IMAGE TECHNOLOGIES, LLC, Plaintiff, v. OLYMPUS CORPORATION AND OLYMPUS IMAGING AMERICA, INC., Defendants.	CASE NO. SACV 12-01676-ODW (MRW _x) JOINT SUBMISSION REGARDING PROTECTIVE ORDER AND ESI ORDER Judge: Hon. Otis D. Wright, II
7 8 9 10 11 12	DIGITECH IMAGE TECHNOLOGIES, LLC, Plaintiff, v. SONY CORPORATION; SONY CORPORATION OF AMERICA; and SONY ELECTRONICS INC., Defendants.	CASE NO. SACV 12-01678-ODW (MRW _x) JOINT SUBMISSION REGARDING PROTECTIVE ORDER AND ESI ORDER Judge: Hon. Otis D. Wright, II
13 14 15 16 17	DIGITECH IMAGE TECHNOLOGIES, LLC, Plaintiff, v. FUJIFILM CORPORATION, Defendant.	CASE NO. SACV 12-01679-ODW (MRW _x) JOINT SUBMISSION REGARDING PROTECTIVE ORDER AND ESI ORDER Judge: Hon. Otis D. Wright, II
18 19 20 21 22	DIGITECH IMAGE TECHNOLOGIES, LLC, Plaintiff, v. GENERAL IMAGING CO., Defendants.	CASE NO. 8:12-cv-01680-ODW (MRW _x) JOINT SUBMISSION REGARDING PROTECTIVE ORDER AND ESI ORDER Judge: Hon. Otis D. Wright, II

1 2 3 4 5 6	DIGITECH IMAGE TECHNOLOGIES, LLC, Plaintiff, v. SIGMA CORPORATION ET AL., Defendant(s).	CASE NO. SACV 12-01681-ODW (MRW _x) JOINT SUBMISSION REGARDING PROTECTIVE ORDER AND ESI ORDER Judge: Hon. Otis D. Wright, II
7 8 9 10 11	DIGITECH IMAGE TECHNOLOGIES, LLC, Plaintiff, v. NIKON CORPORATION AND NIKON INC., Defendants.	CASE NO. SACV 12-01685-ODW (MRW _x) JOINT SUBMISSION REGARDING PROTECTIVE ORDER AND ESI ORDER Judge: Hon. Otis D. Wright, II
12 13 14 15 16 17 18	DIGITECH IMAGE TECHNOLOGIES, LLC, Plaintiff, v. PENTAX RICOH IMAGING COMPANY, LTD., PENTAX RICOH IMAGING AMERICAS CORP., RICOH COMPANY, LTD., AND RICOH AMERICAS CORP., Defendants.	CASE NO. SACV 12-01689-ODW (MRW _x) JOINT SUBMISSION REGARDING PROTECTIVE ORDER AND ESI ORDER Judge: Hon. Otis D. Wright, II
19 20 21 22 23 24 25 26 27 28	DIGITECH IMAGE TECHNOLOGIES, LLC, Plaintiff, v. XEROX CORPORATION, Defendant.	CASE NO. SACV 12-01693-ODW (MRW _x) JOINT SUBMISSION REGARDING PROTECTIVE ORDER AND ESI ORDER Judge: Hon. Otis D. Wright, II

1	DIGITECH IMAGE	CASE NO. SACV 12-01694-ODW
2	TECHNOLOGIES, LLC,	(MRW _x)
3	Plaintiff,	
4	v.	JOINT SUBMISSION REGARDING
5	KONICA MINOLTA BUSINESS	PROTECTIVE ORDER AND ESI
6	SOLUTIONS, U.S.A., INC.,	ORDER
7	Defendants.	Judge: Hon. Otis D. Wright, II
8	DIGITECH IMAGE	CASE NO. 8:12-cv-01696-ODW
9	TECHNOLOGIES, LLC,	(MRW _x)
10	Plaintiff,	
11	v.	JOINT SUBMISSION REGARDING
12	VICTOR HASSELBLAD AB and	PROTECTIVE ORDER AND ESI
13	HASSELBLAD USA INC.,	ORDER
14	Defendants.	Judge: Hon. Otis D. Wright, II
15	DIGITECH IMAGE	CASE NO. SACV 12-01697-ODW
16	TECHNOLOGIES, LLC,	(MRW)
17	Plaintiff,	
18	v.	JOINT SUBMISSION REGARDING
19	CASIO COMPUTER CO LTD, et	PROTECTIVE ORDER AND ESI
20	al.,	ORDER
21	Defendant(s).	Judge: Hon. Otis D. Wright, II
22	DIGITECH IMAGE	CASE NO. SACV 12-02122 ODW
23	TECHNOLOGIES, LLC,	(SS _x)
24	Plaintiff,	
25	v.	JOINT SUBMISSION REGARDING
26	ASUS COMPUTER	PROTECTIVE ORDER AND ESI
27	INTERNATIONAL and ASUSTEK	ORDER
28	COMPUTER INC.,	
	Defendants.	Judge: Hon. Otis D. Wright, II
	DIGITECH IMAGE	CASE NO. SACV 12-02123-ODW
	TECHNOLOGIES, LLC,	(MRW _x)
	Plaintiff,	
	v.	JOINT SUBMISSION REGARDING
	MOTOROLA MOBILITY LLC, et	PROTECTIVE ORDER AND ESI
	al.,	ORDER
	Defendant.	Judge: Hon. Otis D. Wright, II

1 DIGITECH IMAGE
2 TECHNOLOGIES, LLC,
3 Plaintiff,
4 v.
5 APPLE, INC.
6 Defendant.

CASE NO. SACV 12-02125 ODW
(MRWx)

JOINT SUBMISSION REGARDING
PROTECTIVE ORDER AND ESI
ORDER

Judge: Hon. Otis D. Wright, II

6 DIGITECH IMAGE
7 TECHNOLOGIES, LLC,
8 Plaintiff,
9 v.
10 LEICA CAMERA AG and LEICA
11 CAMERA INC.,
12 Defendants.

CASE NO. SACV 12-01677-ODW
(MRWx)

JOINT SUBMISSION REGARDING
PROTECTIVE ORDER AND ESI
ORDER

Judge: Hon. Otis D. Wright, II

Pursuant to the Court's Order for the parties to this consolidated litigation to file a joint brief addressing their respective positions on the protective and electronically-stored information orders to be issued in this case, Plaintiff Digitech Image Technologies, LLC ("Plaintiff") and Defendants Electronics for Imaging, Inc., Panasonic Corporation, Panasonic Corporation of North America, Canon Inc., Canon U.S.A., Inc., Sakar International, Inc. d/b/a Vivitar, Leaf Imaging LTD (d/b/a Mamiyaleaf), Mamiya America Corporation, Olympus Corporation, Olympus Imaging America, Inc., Leica Camera AG, Leica Camera Inc., Sony Corporation, Sony Corporation of America, Sony Electronics, Inc., FUJIFILM Corporation, General Imaging Co., Sigma Corporation et al., Target Corporation, Nikon Corporation, Nikon Inc., Pentax Ricoh Imaging Company, Ltd., Pentax Ricoh Imaging Americas Corp., Ricoh Company, Ltd., Ricoh Americas Corp., Xerox Corporation, Konica Minolta Business Solutions, U.S.A., Inc., Victor Hasselblad AB and Hasselblad USA Inc., Casio Computer Co Ltd, Casio America, Inc., ASUS Computer International, ASUSTek Computer Inc., and Motorola Mobility LLC et al. (collectively "Defendants"), file this joint brief as follows:

I. INTRODUCTION.

A. PLAINTIFF'S INTRODUCTION

In this consolidated litigation, Plaintiff contends that Defendants infringe United States Patent No. 6,128,415 ("the '415 patent"), entitled "Device Profiles for a Digital Image Processing System." Plaintiff states that various claims of the

1 '415 patent cover, inter alia, a device profile for describing properties of a device in
2 a digital image reproduction system to capture, transform or render an image, said
3 device profile comprising: first data for describing a device dependent
4 transformation of color information content of the image to a device independent
5 color space; and second data for describing a device dependent transformation of
6 spatial information content of the image in said device independent color space.
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9 Pursuant to the Court's Order for the parties to this consolidated litigation to
10 file a joint brief addressing their respective positions on the protective and
11 electronically-stored information orders to be issued in this case, the parties have
12 meet and conferred in order to resolve as many issues as possible and to focus the
13 significant disputed issues for the Court.. To that end, the Defendants have agreed
14 that the proposed ESI Order previously submitted by Plaintiff should be entered for
15 the above-referenced consolidated cases. A copy of that proposed ESI Order is at
16 Exhibit 1 hereto.
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19
20 The parties have also narrowed their differences over the protective order to
21 two areas of disagreement for the Court to resolve. Those two areas are the scope of
22 the prosecution bar and the provisions applicable to the review and use of source
23 code. Plaintiff's proposed Protective Order, which has Plaintiff's Proposed
24 prosecution bar and source code provisions, is at Exhibit 2 hereto. Defendants'
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1 proposed Protective order, which has Defendants' proposed prosecution bar and
2 source code provisions, is at Exhibit 3 hereto.

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4 Defendants' allegation below about the Court stating that it would enter the
5 Defendants' proposed protective order are inaccurate. The Court's preliminary
6 statement was based upon an incomplete representation by one of the Defense
7 counsel that the Defendants' proposed protective order was different only in that it
8 sought to prevent Digitech's employees from seeing highly confidential
9 information. As Counsel for Digitech correctly pointed out at the hearing – to
10 which the Court invited briefing – that is not an area of actual dispute; but rather,
11 there are multiple other differences between the parties' respective positions. In
12 fact, Defendants conceded multiple points during the meet and confer process, and
13 still multiple points of disagreement remain, all of which are different from what
14 the representative of the Defendants stated at the hearing.

15
16 Further, Defendants' complaint about not receiving an earlier redline of their
17 proposed order is misplaced. First, the meet and confer process is a two-way street.
18 Second, Digitech invited the Defendants to provide a redline of its proposed order –
19 which the Defendants declined to do – which prompted Digitech to provide its own
20 redline in an effort to advance the process. Exhibit 4. Third, Defendants' complain
21 that Digitech did not provide "specific" written objections to their improper
22 protective order provisions until Digitech provided its portion of this joint
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1 submission earlier today; however, Defendants fail to mention what was discussed
2 during the parties meet and confers. Moreover, although Defendants' carry the
3 burden of showing good cause for their improper and burdensome restrictions, to
4 date they have *never* articulated any such good cause, except for vague concerns
5 about alleged inadequacy of the Northern District's standard order, which has
6 worked admirably in scores if not hundreds of patent infringement cases.
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B. DEFENDANT'S INTRODUCTION

After the Court stated that it would enter Defendants' proposed protective order, Digitech requested an opportunity for briefing to address its objections to the Defendants' proposed order and the Court ordered the present joint brief. Despite having requested the current briefing, by last Wednesday Digitech had not contacted Defendants' to meet and confer on the disputed issues. Defendants' sent Digitech's counsel an email on Wednesday requesting its proposed edits to Defendants' protective order. Digitech refused to provide any edits to Defendants' order, but offered to meet and confer. On Thursday Defendants requested a telephone conference with Digitech to discuss the Protective Order and emphasized the need to act promptly in view of the Monday deadline and the need to get input from many international clients. Digitech did not respond to that email until today, Monday, April 15 (the day this joint brief is due) and identified, for the first time, its objections and edits to Defendants' proposed order.

II. SCOPE OF THE PROSECUTION BAR.

A. PLAINTIFF'S POSITION.

Defendants seek to impose a "prosecution bar" upon Plaintiff's counsel and Plaintiff's experts who have access to Defendants' confidential information. A prosecution bar prohibits such persons from engaging in patent prosecution in the relevant area for a significant period of time. The justification for prosecution bars

1 is that persons having access to confidential information might *inadvertently* use or
2 disclose it in patent prosecution activities, for example when drafting patent claims.
3
4 *See, e.g., In re Deutsche Bank Trust Co. Americas*, 605 F.3d 1373, 1380 (Fed. Cir.
5 2010). Although a prosecution bar can present a significant burden on Plaintiff's
6 ability to retain qualified experts in the field, Plaintiff is agreeable to there being a
7 prosecution bar, *provided it is mutual to both sides*.

9 Plaintiff's proposed prosecution bar language is almost verbatim from the
10 model protective order for patent cases from the U.S. District Court for the
11 Northern District of California. <http://www.cand.uscourts.gov/stipprotectorder>. Per
12 standard practice in the Northern District and elsewhere, the language is equally
13 applicable to both sides. The only difference between Digitech's proposed order
14 and the Northern District Standard Order is that Digitech had added "patent
15 acquisition activities" to the normally covered "patent prosecution activities" in
16 order to address the Defendants' belated demand that "patent acquisition activities"
17 also be covered. The scope of the prosecution bar should be equally applicable to
18 both sides. First, it imposes an impediment upon a parties' ability to retain
19 qualified experts in the field. Fairness dictates that both sides should have to deal
20 with the same constraint. Second, the justification for a prosecution bar is that a
21 lawyer (or expert) may *inadvertently* use or disclose confidential information
22 during patent prosecution. *See, e.g., In re Deutsche Bank Trust, supra*. One could
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1 inadvertently use or disclose an adverse party's confidential information just like
2 one could inadvertently use or disclose the confidential information of one's own
3 client. Further, this case is likely to involve discovery from third parties, including
4 the inventors of the '415 patent; from what remains from the original assignee of
5 the '415 patent, which is Polaroid Corporation; and from third party witnesses, for
6 example with respect to alleged prior art. The confidential information of such
7 third parties is equally subject to inadvertent use or disclosure by counsel (and
8 experts) for Plaintiff as by counsel (and experts) for Defendants.

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12 Defendants' focus upon "Digitech" for their one-sided prosecution bar is
13 misplaced and seeks only to distract the Court from the facts and issues. Under the
14 *agreed* portions of the protective order, no one from Digitech will have access to
15 HIGHLY CONFIDENTIAL information or source code of the Defendants. Since
16 the employees of Digitech will lack access to any highly confidential information
17 that could possibly be used for patent prosecution or acquisition, the prosecution
18 bar is irrelevant to them. The prosecution bar in this case will apply to outside
19 litigation counsel and experts, none of whom are involved in the business of
20 Digitech.

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24 Further, Defendants' allegation that "there is no reason to subject
25 Defendants' counsel to a prosecution bar" while Plaintiff's counsel should be – is
26 misplaced. All counsel in this case represent plaintiffs in some cases and
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1 defendants in other cases. Presumably all counsel in this case are patent attorneys,
2 and presumably all could be called upon by clients to give advice on patent claims
3 or acquisitions at some point. Thus, any prosecution bar should apply across the
4 board, including to ensure that its purpose of guarding against inadvertent use or
5 disclosure – by anyone involved – is fulfilled. The suggestion that Defense counsel
6 are somehow more trustworthy or too good to be burdened with the prosecution bar
7 they seek to impose on Plaintiff’s counsel is wholly erroneous.

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10 Further, Defendants have no answer for the fact that the prosecution bar is
11 a burden on the parties’ experts, and upon finding and retaining skilled experts in
12 the field. If there is to be a prosecution bar in this case, fairness requires that both
13 sides be burdened the same with it when it comes to finding and retaining experts.

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16 For the foregoing reasons, Plaintiff’s proposed *mutual* prosecution bar in
17 the proposed protective order at Exhibit 2, which is verbatim (with one exception
18 requested by Defendants) from the Northern District’s model order, should be
19 adopted.

20 21 **B. DEFENDANTS’ POSITION.**

22
23 Digitech and Defendants agree that a patent prosecution bar is appropriate
24 in this case, but have proposed prosecution bars with somewhat different
25 provisions. Because Digitech has only stated that Defendants’ prosecution bar is
26 “one-sided and unreasonable,” the reasons for and nature of Digitech’s objections
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1 are unclear. Defendants' proposed prosecution bar should be adopted for the
2 following reasons.

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4 The purpose of both of the parties' proposed patent prosecution bars is to
5 prevent litigation counsel from intentionally or inadvertently using information
6 produced in discovery for matters other than the litigation. *See* Digitech's
7 Protective Order D.E. 37-4 at 8; Defendants' Protective Order D.E. 37-5 at 10
8 (confidential material is produced only for use in this case). Patent prosecution bars
9 avoid the situation where one party obtains an unfair advantage by using an
10 opposing party's confidential technical information produced in discovery to
11 prosecute or acquire new patent rights that read on the opposing party's products.

12
13 The Defendants here develop, manufacture, and/or sell products, and each
14 will likely produce highly confidential technical information related to those
15 products in response to Digitech's discovery requests. Thus, a prosecution bar
16 against the recipients of Defendants' confidential information serves the above
17 stated goals of a prosecution bar. By contrast, because Digitech does not develop,
18 manufacture, or sell any product, it will not produce any confidential product-
19 related technical information of its own that would merit a prosecution bar against
20 recipients.

21
22 Further, Defendants' prosecution bar comports with the principles set
23 forth by the Federal Circuit in *In re Deutsche Bank Trust Co. Americas LLC*, 605
24

1 F.3d 1373 (Fed. Cir. 2010). “[I]t is very difficult for the human mind to
2 compartmentalize and selectively suppress information once learned, no matter how
3 well-intentioned the effort may be to do so.” *Id.* at 1378 (quoting *FTC v. Exxon*
4 *Corp.*, 636 F.2d 1336, 1350 (D.C. Cir. 1980)). The risk of inadvertent disclosure is
5 especially apparent in this case because Digitech will have access to the source
6 code of over a dozen defendants, each of which manufacture digital imaging
7 products or mobile telecommunication devices and are competitors in the market.
8 Some of the Defendants’ proprietary source code contains the latest developments
9 in the field of digital imaging. *Id.* at 1381 (“New inventions and technology under
10 development, especially those that are not already the subject of pending patent
11 applications, may pose a heightened risk of inadvertent disclosure by counsel
12 involved in prosecution-related competitive decisionmaking. . . .”). This is a clear
13 case where counsel, who has access to the cutting-edge source code of multiple
14 competing companies, should be prohibited from prosecuting patents in the relevant
15 field for an appropriate period of time.

21 In addition, Digitech exists for the sole purpose of asserting nearly twenty
22 year old patent rights it acquired from others. Digitech does not bear the risk that
23 Defendants will use Digitech’s information to acquire patent rights to use against
24 Digitech. First, Digitech has not represented that it has any confidential
25 information that requires protection. Given the age of the patent and the fact that
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1 Digitech acquired this patent from a third-party, who in turn acquired it from a
2 successor of the bankrupt Polaroid Corporation, it is unlikely that Digitech will
3 produce much if any confidential technical information. Second, Digitech does not
4 develop, manufacture, or sell anything. Thus, there is no opportunity for
5 Defendants to gain an unfair advantage by tailoring their patents to cover Digitech's
6 products. There are no such products. Third, Digitech's outside counsel has
7 represented that they do not perform any patent prosecution whatsoever, let alone
8 the prosecution of digital imaging patents. Thus, Digitech has not identified any
9 reason why it or its outside counsel would be harmed by a prosecution bar.

13 Since the same risk of inadvertent disclosure does not exist for
14 Defendants, the two-way prosecution bar wished for by Digitech is unwarranted.
15 To the extent that Digitech does in fact produce any relevant source code (perhaps
16 for issues relevant to conception or reduction to practice), that code would concern
17 products and software produced over 15 years ago, as the '415 patent was filed in
18 1996. This stale information poses no risk of harm to Digitech, while review of
19 Defendants' present and highly confidential source code, concerning products
20 currently on the market, poses the risk of serious and irreparable harm to
21 Defendants. The prosecution bar requested by Defendants can mitigate this risk,
22 even for inadvertent or unintentional disclosures.

1 Accordingly, there is no reason to subject Defendants' counsel to a
2 prosecution bar. And Digitech has not provided any. Digitech's stated concern
3 about the impact of Defendants' proposed bar on third parties is entirely
4 hypothetical. As stated above, the prosecution bar is intended to protect
5 confidential information describing a party's products from being used to by
6 another to obtain patent rights. Right now the parties can only speculate whether
7 any third party's products are relevant to this litigation. Should such third party
8 product information become relevant, the need for a prosecution bar can be
9 addressed on a case-by-case basis with those third parties.

13 **III. PROVISIONS RELATING TO REVIEW AND USE OF SOURCE** 14 **CODE.**

15 **A. PLAINTIFF'S POSITION.**

16 Plaintiff's proposed source code provisions are also verbatim from the
17 model protective order from the U.S. District Court for the Northern District of
18 California. <http://www.cand.uscourts.gov/stipprotectorder>. The Northern District
19 has struck an appropriate balance between the confidentiality of source code and
20 the need to avoid unduly hindering a party's ability to review code, work with
21 experts, prepare expert reports, conduct motion practice and try their case.

22 The touchstone of the Northern District's model order is reasonableness
23 and avoiding the micro-managing of source code review and use, because the facts
24 of each case call for reasonableness on both sides of the aisle. For example, the
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1 Northern District's model order provides for source code to be made available in a
2 "format allowing it to be reasonably reviewed" at "mutually agreeable times" and
3 "mutually agreed upon" locations. Source code is appropriately made available for
4 inspection on a "secured computer in a secured room without Internet access or
5 network access," and the receiving party is prohibited from copying or transferring
6 any portion of the source code onto any recordable media or recordable device.
7
8 Further, the Receiving Party may request paper copies of limited portions of source
9 code that are "reasonably necessary for the preparation of court filings, pleadings,
10 expert reports, or other papers, or for deposition or trial, but shall not request paper
11 copies for the purposes of reviewing the source code other than electronically."
12
13 Any such source code is appropriately marked as "HIGHLY CONFIDENTIAL -
14 SOURCE CODE" to help ensure its utmost confidentiality. Further, if the
15
16 producing party deems the amount of source code required requested to be printed
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18 to be excessive, it may seek court intervention.
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20 In stark contrast to the Northern District's fair, balanced and reasonable
21 approached, Defendants' proposed source code provisions are non-standard,
22 arbitrary, micro-managing and unduly burdensome on the Plaintiff. Without
23
24 limitation:

25 (1) Defendants' proposal requires Plaintiff to make any source code
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27 available it its counsel's Santa Ana office of its outside counsel, but allows each
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1 Defendant to decide where to produce its source code. This is one-sided and unduly
2 burdensome on Plaintiff.

3
4 (2) Defendants' proposal requires 30 days notice to inspect source code.
5 This is inappropriate and it would unduly hinder Plaintiff's ability to review code in
6 this case.

7
8 (3) Despite the fact that source code will be provided on a secure "black
9 box" computer with no means to copy or transfer files, Defendants' seek to prevent
10 Plaintiff's counsel and experts from bringing their laptop computers and cell
11 phones into the code review room. This is inappropriate and unduly burdensome,
12 and it would unduly inconvenience Plaintiff's counsel and experts, and thus hinder
13 Plaintiff's ability to review code in this case.

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16 (4) In lieu of the "reasonableness" provisions in the Northern District's
17 model order, Defendants seek to arbitrarily provide that "more than five (5) pages
18 of a continuous block of Source Code shall be presumed to be excessive." Such
19 arbitrary provisions are not tailored to any facts of this case, no good cause has
20 been shown for them, and they will like unduly hinder Plaintiff's ability to review
21 and use code in this case.

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23
24 (5) In lieu of the "reasonableness" provisions in the Northern District's
25 model order, Defendants seek to arbitrarily provide that the "Receiving Party shall
26 have no more than a total of fifty (50) pages of a Producing Party's Source Code in
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1 its possession at any one time, and may request no more than one hundred (100)
2 pages total of Source Code” across all of these many consolidated cases. Such
3 arbitrary provisions are not tailored to any facts of any case, and would unduly
4 hinder Plaintiff’s ability to review and use code in this consolidated litigation.
5

6 Defendants point to hand-picked *stipulated* protective orders in support of
7 their position. However, nothing is known about the particular facts of those cases
8 that justified, for example, specific page limits on source code production without
9 any reasonableness requirement. For example, it is not known whether source code
10 was even at issue in those cases, or whether the parties to those cases even intended
11 to inspect source code, or whether any significant volumes of source code might
12 have been expected to be produced. Although Plaintiff could cite to scores, if not
13 hundreds of cases, in which the standard provisions of the Northern District’s
14 protective order have worked well, Defendants’ cannot point to a single contested
15 decision in which a court has adopted their position over a party’s objection.
16

17 To summarize, Defendants’ proposed source code provisions are non-
18 standard, arbitrary, micro-managing and unduly burdensome on the Plaintiff. For
19 the foregoing reasons, Plaintiff’s proposed source code provision in the proposed
20 protective order at Exhibit 2, which is verbatim from the Northern District’s
21 reasonably worded model order, should be adopted.
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23 **B. DEFENDANTS’ POSITION.**

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1 Digitech and Defendants agree that Defendants' proprietary and
2 confidential source code requires some form of heightened discovery protection.
3
4 Defendants' proposed protective order provides specific protections to guide the
5 parties' review and handling of this highly sensitive information.

6 Although opposed to Defendants' proposed order, Digitech did not
7 provide any specific objections until 4:00pm Pacific on the day of this filing. Up
8 until this point, Digitech had merely argued that Defendants' source code
9 provisions are "overly burdensome and unreasonable." Thus, Defendants were
10 forced to prepare their responsive brief by speculating as to Digitech's possible
11 objections. Defendants' address Digitech's late specific objections tracking
12 Digitech's numbering above, as follows:

13
14 (1) Defendants' Protective Order identifies Counsel for Digitech's Santa
15 Ana office as their preferred location for review of source code, but it allows for
16 another mutually agreeable location. Defendants are willing to meet and confer
17 with Digitech to attempt to establish a mutually agreeable location for each of
18 Defendants' source code productions.

19
20 (2) The 30 days proposed by Defendants provides a reasonable time
21 frame to make the necessary arrangements for source code review. Digitech has
22 not proposed any alternative, nor articulated why 30-days notice is "inappropriate"

1 or would “unduly hinder” Digitech’s review. Advanced notice is not inappropriate
2 and certainly would not hinder Digitech’s actual review of source code.
3

4 (3) Given the camera functionality and network connections afforded
5 almost all modern laptops and phones, the “black box” security provisions provided
6 would be wholly frustrated if other devices were allowed into the source code
7 review room.
8

9 (4)-(5) These provisions are addressed in detail below. However,
10 Defendants’ note that the proper interpretation of the provisions limiting the
11 number of source code pages are on a per producing party basis, not one limit for
12 all parties across the numerous consolidated litigations as Digitech suggests.
13

14 **(i) Defendants’ provisions for printing and handling source code are**
15 **standard terms, which this Court has previously adopted.**
16

17 Defendants’ source code provisions are neither overly burdensome nor
18 unreasonable. Defendants’ order provides specific provisions governing the
19 inspection, copying, and handling of its source code, which are intended to provide
20 clear and useful guidelines to the parties on the source code issue that are not
21 afforded by the N.D. Cal. model protective order for patent cases offered by
22 Digitech.
23

24 Digitech’s proposed protective order does not provide any guidelines for
25 these issues and only states that the “Producing Party may challenge the amount of
26 source code requested in hard copy form.” Therefore, under Digitech’s proposed
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1 protective order, the parties will need to repeatedly debate the extent to which it is
2 “reasonably necessary” for Digitech to make paper copies, including how many
3 copies Digitech may make and the length of each copy. These types of continuous
4 disputes, which squander the parties’ and this Court’s time and judicial resources,
5 can be readily resolved in advance, by adopting the clear limitations set forth in
6 Defendants’ proposed protective order.
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8
9 Digitech argues that these provisions are “non-standard, arbitrary, micro-
10 managing and unduly burdensome,” but this is absolutely incorrect. In fact, this
11 Court has consistently recognized that additional safeguards are necessary (over the
12 standard N.D. Cal. protective order) to prevent unauthorized dissemination or
13 misuse of proprietary and confidential source code. *See, e.g., One-E-Way, Inc. v.*
14 *Audiovox Corp.*, 2:12-cv-00580-ODW-JC, Stipulated Protective Order (D.E. 18)
15 (C.D. Cal. July 31, 2012) (ordered on Aug. 10, 2012); *Network Signatures, Inc. v.*
16 *General Mills, Inc.*, Case 8:11-cv-01729-JVS-RNB, Order re Stipulated Protective
17 Order (D.E. 41) (C.D. Cal. June 18, 2012).
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21 Aside from generally arguing that Defendants’ source code provisions
22 unduly hinder Digitech’s review, Digitech has articulated no reason why
23 Defendants’ source-code provisions would result in unfairness or hardship to
24 Digitech. And, contrary to Digitech’s argument, Defendants have demonstrated
25 “good cause” for this Court to adopt its provisions—that is, that the highly sensitive
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1 nature of source code has been recognized by this Court, and Defendants' proposed
2 protocol for inspecting, copying, and handling source code is neither unreasonable
3 nor renders any injustice on Digitech.
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5 **(ii) Defendants' protocol for source-code inspection is similar to**
6 **protocols commonly adopted by this Court.**

7 To govern Digitech's inspection and use of any source-code production,
8 Defendants propose a straightforward and commonly used set of procedures, as set
9 forth in Section 11 of Defendants' Protective Order. *See* Exhibit 3. These
10 procedures include, among other things, making source code available for
11 inspection at the offices of the producing party's outside counsel (or another
12 location designated by the producing party). Retaining source code at a location of
13 the producing party ensures the highest degree of security for Defendants' source
14 code and allows Defendants to make available the necessary technical support for
15 facilitating Digitech's review and printing of the code. Defendants further propose
16 that source code is subject to reasonable and defined limits on printing, copying,
17 and electronic imaging, as described in subparagraphs iii, v, viii, ix, and xii of
18 Exhibit 3.
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23 Digitech's proposed protective order, like Defendants', states that source
24 code should not be printed for off-site review and that printing is only allowed for
25 the limited purposes such as use in Court filings. But Digitech's proposed order
26 gives no guidance as to how much source code printing is "reasonable" for these
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1 purposes. Under Digitech's proposed order, each individual Defendant will have to
2 later debate with Digitech what is reasonable on a case-by-case basis. In an effort
3 to avoid burdening the Court with numerous motions regarding what constitutes
4 non-excessive and "reasonable" printing and copying limits, the Defendants'
5 protective order sets forth express limits that are deemed reasonable.
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8 This Court has adopted procedures like those proposed by Defendants for
9 handling source code. *See, e.g., One-E-Way, Inc. v. Audiovox Corp.*, 2:12-cv-
10 00580-ODW-JC, Stipulated Protective Order (D.E. 18) (C.D. Cal. July 31, 2012)
11 (ordered on Aug. 10, 2012); *Network Signatures, Inc. v. General Mills, Inc.*, Case
12 8:11-cv-01729-JVS-RNB, Order re Stipulated Protective Order (D.E. 41) (C.D.
13 Cal. June 18, 2012). In these cases, this Court accepted protective orders providing
14 heightened levels of security for source code. For example, in *One-E-Way*, a patent
15 infringement case in this Court, the defendant's highly sensitive source code was
16 also at issue. This Court adopted a stipulated protective order with many of the
17 same security provisions that Defendants here have requested. *See One-E-Way*,
18 Stipulated Protective Order, D.E. 18. The *One-E-Way* order provides that (a)
19 source code will be made available during regular business hours on two business
20 days of notice and (b) source code may not be copied (electrically or not) by the
21 receiving party. *See id.* The order also provides provisions on the handling of the
22 source code room (including items brought into or left within the room) and the
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1 handling of paper copies of source code. *See id.* These are the very same
2 provisions included by Defendants in their proposed order, wholly absent from
3 Digitech’s proposed order, and yet objected to by Digitech as “non-standard,
4 arbitrary, micro-managing and unduly burdensome.” It is unclear, however, how
5 Defendants’ provisions are somehow less reasonable than those adopted in the *One-*
6 *E-Way* order.
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9 In addition, in *Network Signatures* (also a patent infringement case in this
10 Court), this Court adopted another similar protective order when the defendants’
11 source code was at issue. *See Network Signatures*, Order re Stipulated Protective
12 Order (D.E. 41). In fact, the *Network Signatures* order provided explicit limitations
13 on (a) the number of consecutive pages of printed source code the receiving party
14 could obtain, (b) the aggregated number of pages of printed source code the
15 receiving party could obtain, and (c) the number of additional paper copies the
16 receiving party’s outside counsel could make—just as Defendants’ proposed order
17 articulates. *See id.* The *Network Signatures* order also included provisions (similar
18 to Defendants’ provisions) for logging the receivers and reviewers of source code,
19 for maintaining and storing source code, and for marking and using source code in
20 court documents. *See id.* Digitech’s proposed order contains little to no limitations
21 on these review procedures, instead leaving it up to the parties to dispute these
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1 issues down the road, unnecessarily burdening this Court with the need for judicial
2 intervention.

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4 As this case could raise issues about Defendants' highly sensitive source
5 code, Defendants have an overwhelming interest in protecting the misuse or
6 dissemination of its proprietary source code. Digitech has failed to timely offer any
7 reason why the security provisions in Defendants' proposed protective order are
8 "overly burdensome" or "unreasonable." Instead, Digitech merely complained that
9 Defendants' protective order differs from the standard N.D. Cal. protective order.
10
11 See E-mail from J. Edmonds to K. Lieb (Apr. 10, 2013), attached as Exhibit 5.

12
13 This Court has repeatedly allowed modifications to the standard N.D. Cal.
14 protective order. Here, Defendants have sought to provide reasonable and fair
15 guidelines on the inspection of source code, which this Court has repeatedly agreed
16 demands a heightened level of protection, and which Digitech cannot refute.

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18 Accordingly, Defendants seek similar protections in this case for
19 governing the inspection, copying, and handling of highly confidential source code.
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